for lack of the discussion of "alternatives" required by 42 U.S.C. § 4332(2)(C)(iii), requires an "environmental" injury in keeping with the overall purpose of the Act, conflicts expressly and specifically with the Eighth Circuit application of *Bennett v. Spear*, 520 U.S. 154 (1997), as well as with a proper reading of *Bennett* itself. The Eighth Circuit is correct; the Ninth Circuit is in error.[1] The Ninth Circuit's ruling virtually eliminates enforcement of the NEPA requirement to consider "alternatives", which the court calls "the heart of the environmental impact statement."

In *Bennett v. Plenert*, 63 F.3d 915 (9th Cir. 1995), water users claimed damage to their financial interests because a Biological Opinion, required by the Endangered Species Act ("ESA") following a determination that a reservoir management plan "may adversely affect a listed species", did not comply with §7 of the ESA. Section 7 requires that such Opinions "use the best scientific and commercial data available." The court first determined that the issue "is not whether the

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[1] The Ninth Circuit claims support in the ruling of the D.C. Circuit in *Town of Stratford v. F.A.A.*, 285 F.3d 84, 89 (D.C. Cir. 2002). The D.C. Circuit's suggestion that the Eighth Circuit in *Friends of Boundary Waters, supra*, improperly gauged congressional intent by reference to regulations rather than statutory language, however, appears to ignore the familiar rule that an agency's regulations interpreting its statutory mandate are persuasive regarding statutory intent. The Eighth Circuit has affirmed its position despite the D.C. Circuit's comments. Further, there is no reliance upon regulations in the present case. Ashley Creek relies directly upon the statutory mandate to consider "alternatives" and it must be noted that the D.C. Circuit's definition of this statutory term is entirely in accord with Ashley's position. See *Citizens Against Burlington, Inc. v. Busey, 938 F.2d 190, 195 et seq. (D.C. Cir. 1991).*

plaintiffs have satisfied the constitutional standing requirements but whether their action is precluded by the zone of interests test." 63 F.3d at 917. It then determined, citing a ruling on the "zone of interests" under NEPA, that plaintiff's "economic" interests conferred no standing because they were not within the general "environmental" purposes of the ESA.

This Court, in *Bennett v. Spear*, *supra*, affirmed that the issue was not "constitutional standing" but application of the "zone of interests" test. It then reversed, holding that "whether a plaintiff's interest is 'arguably . . . protected . . . by the statute' within the meaning of the zone of interests test is to be determined not by reference to the overall purpose of the Act in question (here, species preservation) but by reference to the particular provisions of law upon which the plaintiff relies." 520 U.S. 175-176. Economic interests were found to be implicated by §7 of the ESA, thus, to state a "concrete interest" within the applicable "zone of interests".

In *Friends of Boundary Waters Wilderness v. Dombeck*, *supra*:

> One group of plaintiffs consist[ed] of several counties, concerned citizens, and outfitters in the BWCA (collectively, "the Outfitters"). The Outfitters brought suit challenging the Wilderness Plan, claiming the plan's motorboat quotas, visitor use restrictions and definitions of "guest" unduly limit access to the BWCA Wilderness in violation of . . . the

> National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4332(2) (1994).

164 F.3d at 1120. Plaintiffs asserted "that the Final Environmental Impact Statement ("FEIS"), prepared to aid the agency in analyzing the effects of the Wilderness Plan, was inadequate to satisfy the terms of NEPA." *Id.* at 1125.

> The district court determined that the Outfitters did not have standing to raise their NEPA claims because they complain of potential economic loss, which the district court concluded is not a protected interest under NEPA.

Id. The Eighth Circuit reversed on the authority of *Bennett v. Spear*, holding:

> While the overall purpose of NEPA is to establish "a broad national commitment to protecting and promoting environmental quality" . . . the particular provisions relied on by the Outfitters [42 U.S.C. § 4332(2)(C)] ~~in~~dicate that the social and economic effects of proposed agency action must also be considered once it is determined that the proposed agency action significantly affects the physical environment.

Id. at 1125. "[P]otential economic loss" was found within the appropriate zone of interest. *Id.* at 1127. This ruling was specifically re-affirmed in *Central South*

Dakota Coop. Grazing Dist. v. U.S. Dept. of Agric., supra, and *Rosebud Sioux Tribe v. McDivitt, supra.*

An earlier Ninth Circuit ruling appears to have correctly interpreted *Bennett v. Spear*, though the issue of its application was not actually contested. The Ninth Circuit regarded this precedent as largely inapplicable in this case.

In *Sausalito v. O'Neill*, 386 F.3d 1186 (9 Cir. 2004), the city asserted that "the FEIS fails to consider reasonable alternatives to the Plan." 386 F.3d at 1207. This failure was alleged to threaten the city's "economic" interests, such as "tax revenue". *Id.* at 1198-1199.

Defendant did not question the city's standing under NEPA. The court found that "Sausalito has met its burden of establishing concrete 'injury in fact' to its proprietary interests." *Id.* at 1198. In particular, "*each* of the management, public safety, *economic*, aesthetic, and natural resource harms constitute injury to Sausalito's 'proprietary interests as a municipal entity.'" *Id.* at 1199. The court must have found standing under NEPA, because it is obligated to raise standing even if defendant does not. Instead, it fully considered Sausalito's "alternative" claims. *Id.* at 1207 et seq.

"[F]or Article III purposes, we may recognize a 'procedural injury' when a procedural requirement has not been met, so long as the plaintiff also asserts a 'concrete interest' that is threatened by the failure to comply with *that requirement*. *Id.* at 1197 (emphasis added). The only NEPA "procedural requirement" allegedly not met was the requirement to consider

"alternatives to the proposed action under §102(2)(C)(iii)." The "concrete interest" allegedly threatened by this "procedural violation" was Sausalito's "proprietary interests", including "economic interests". This created a "procedural injury".

THE PRESENT RULING

The Ninth Circuit notes that *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992) states a fairly simple formula: procedural *violation* + *interest* affected by the *procedure violated* = procedural *injury* sufficient for constitutional standing to contest the violation. 420 F.3d at 938. This is the rule quoted above from *Sausalito, supra*, 386 F.3d at 1197. The allegation of a "procedural injury" suffices for "Article III standing." *Id.* at 1197-99.

Nevertheless, the Ninth Circuit now says that a "plaintiff alleging a procedural *injury* must *also* assert a concrete interest that is threatened by failure to comply with the procedural requirement." 420 F.3d at 938. Such "concrete interest" can only be one impacted by "geographical nexus" to the project causing environmental harm. Any other interest, however protected by the procedure violated, does not suffice. *Id.* This simply re-asserts a definition of "procedural injury" invalidated by *Bennett v. Spear*. Under it, no one has standing to protest violations of "particular provisions of law" requiring particular content of an EIS, who would not also have standing to assert the "significant impact upon the human environment" that invokes the Act.

It is insufficient, according to the Ninth Circuit, that:

> The injury Ashley Creek asserts is that the BLM refused to include in the EIS *the alternative* that Agrium could mine phosphate *from Ashley Creek's Vernal deposits*. Ashley Creek's alleged injury is a procedural one that, in essence, amounts to a claim that the BLM injured it by *failing to comply with NEPA's procedural requirement of considering alternatives*. *See* NEPA § 102(2)(C)(iii) (requiring an EIS to consider alternatives to the proposed action).

Id. at 937-38. (Emphasis added). This is the *Bennett v. Plenert* analysis: plaintiffs' alleged injury is a procedural one that defendant injured them by failing to comply with the ESA's procedural requirement of utilizing "the best scientific and commercial data available."

It is plain, even from the Ninth Circuit's statement, that Ashley's claims fit the definition of "procedural injury" of *Lujan* and *Bennett*. There is plainly asserted a "procedural violation": BLM failed "to comply with NEPA's procedural requirement of considering alternatives". There is plainly asserted a "concrete interest" affected by the procedure: Ashley is the proprietor of the only plausible "alternative to the proposed action", namely, mining "from Ashley's Vernal deposits". Ashley's proprietary interest is plainly threatened by the refusal of BLM to consider its "alternative".

For the Ninth Circuit to graft onto this the further requirement of "a 'geographic nexus' is a circularity re-imposing the rule rejected in *Bennett v. Spear*. This is so because the "geographic nexus" test is simply a prudential consideration, in cases in which an EIS is demanded and refused; assuring that plaintiff "may be expected to suffer whatever *environmental* consequences the project may have." See *City of Davis v. Coleman, infra*. It tests whether the interest alleged is arguably protected by the requirement to perform an EIS. It has no application where the agency determines that an EIS is required, and then fails to provide the requisite content.

The "geographic nexus" test traces, in the cases cited by the Court of Appeals, to *City of Davis v. Coleman*, 521 F.2d 661, 671 (9 Cir. 1975):

> The procedural injury implicit in *agency failure to prepare an EIS* . . . is itself a sufficient "injury in fact" to support standing, provided this injury is alleged by a plaintiff having a sufficient geographical nexus to the site of the challenged project that he may be expected to suffer whatever environmental consequences the project may have.

This is no more than the familiar rule that one seeking to contest whether an EIS is required because a proposed project has a "significant impact upon the human environment", must assert that he is threatened by the alleged environmental impact. This is made explicit by another ruling relied upon by the Court of Appeals:

> The County must also show a "concrete interest" that underlies its procedural interest. That interest *must be within the zone of interests* NEPA was designed to protect. The County's *proprietary* interest in its lands adjacent to the critical habitat represents this necessary "concrete interest".

Douglas County v. Babbit, 48 F.3d 1495, 1501 (9 Cir. 1995) (emphasis added). No doubt, this is why the issue in *Bennett* was not constitutional standing but zone of interests.

The Ninth Circuit may not circumvent *Bennett v. Spear* by holding that where a plaintiff relies upon a particular procedural requirement, which on its face encompasses plaintiff's proprietary interests, the only zone of interest inquiry to be performed is whether plaintiff is close enough to the proposed project to suffer the environmental harm it is the overall purpose of the statute to prevent. It may not disguise this as a "constitutional standing" inquiry which obviates the zone of interests analysis required by *Bennett v. Spear*. For "Article III standing" the Court of Appeals own statement of "the injury Ashley Creek asserts", quoted above, suffices on its face.

PRUDENTIAL STANDING

The Ninth Circuit expresses its central concern (420 F.3d at 939) that:

> Under Ashley Creek's theory, any owner of a phosphate mine, whether located in Alaska, Utah, or Florida, would have standing to challenge the EIS. Why stop there? Taking Ashley Creek's framework one step further, the BLM would be obligated not only to analyze the environmental suitability of unrelated phosphate deposits, but also phosphate substitutes that might be more eco-friendly.

This concern dominates the Ninth Circuit's ruling on "prudential standing", as one that, if *Bennett v. Spear* and *Friends of Boundary Waters* are taken seriously, NEPA would "encompass virtually any economic interest, no matter how remote." *Id.* 942. Respectfully, this is a quarrel with Congress, which the Court of Appeals cannot win.

Congress plainly requires an EIS to consider "alternatives to the proposed action." In the first instance, this undoubtedly includes as alternatives to a phosphate mine in Idaho, phosphate mines, if any, in Alaska, Utah or Florida.

Dealing with the initial breadth of potential "alternatives", is, however, committed to the agencies, not to courts on an empty record. The duties of the agencies are correctly described by the Ninth Circuit in *Sausalito*:

> NEPA provides that federal agencies must, to the fullest extent possible "[s]tudy, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources." 42 U.S.C. §4332(2)(E). The alternatives section is "the heart of the environmental impact statement." 40 C.F.R. §1502.14. The EIS, however, "need not consider an infinite range of alternatives, only reasonable or feasible ones." *City of Carmel-by-the-Sea v. U.S. Dept. Of Transportation*, 123 F.3d 1142 (9 Cir. 1997); 40 C.F.R. § 1502.14(a)-(c). The rule of reason "guides both the choice of alternatives as well as the extent to which the [EIS] must discuss each alternative." *Carmel*, 123 F.3d at 1155. "'[F]or alternatives which were eliminated from detailed study, [the EIS must] *briefly discuss* the reasons for their having been eliminated.'" *Am. Rivers v. FERC*, 201 F.3d 1186, 1200 (9th Cir.2000) (quoting 40 C.F.R. § 1502.14(a) (emphasis added by the court)).

386 F.2d at 1207. This is part of a very extensive body of law defining "alternatives" for purposes of NEPA, presented to, and ignored by, the Ninth Circuit.

Even the most rudimentary "rule of reason" analysis would have shown the BLM that (a) there are no

phosphate mines in Alaska, (b) the phosphate reserves in Florida are largely mined out, and lack economic transport to Idaho, and (c) the Ashley Utah reserves are the *only* conceivable rational alternative to environmentally damaging mining in Idaho. As phosphate is an elemental fertilizer, there is no such thing as a "phosphate substitute". Thus, "under Ashley Creek's theory", there was never more than a single entity which had standing and sufficient knowledge to challenge this EIS under §102(2)(C)(iii).

The Ninth Circuit creates an argument that *Bennett v. Spear* only applies where the particular procedure relied upon by plaintiff has a "different", "independent", or "separate" purpose "from the statute's over-arching purpose of environmental protection" (420 F.3d at 944), and *not* where the procedure "is designed to further" "the statute's over-arching purpose of environmental protection". *Id.* at 944-945. How often can it be seriously argued that the sub-provisions of an Act do not further its overall purpose? Since Congress would not have included the particular requirements if they didn't serve the general purpose, this argument makes *Bennett v. Spear* a one-trick-pony applicable only to the Endangered Species Act. *Bennett* on its face rejects such a construction. The Ninth Circuit's assertion that "economic" interests are excluded by the "environmental" purposes of NEPA, and that the economic concerns implicated by particular procedures "bar" the general purposes of NEPA, is question-begging.

The Ninth Circuit recites that, "*Bennett v. Spear* held that the general purpose of the ESA (species preservation) was different than the specific purpose of

§7 of the ESA (preventing needless economic dislocation)". This contradicts this Court's statement that the requirement to "use the best scientific and commercial data available", though it introduces "another objective", "no doubt serves to advance the ESA's overall goal of species preservation." 520 U.S. at 177.

The Ninth Circuit's reconstruction of *Bennett v. Spear* becomes a ruling that unless it could be shown that inclusion of the requirement to consider "alternatives" in an EIS under NEPA shows a "different" "substantive goal" than environmental protection; its independent significance may be ignored as simply part of the "overall purpose" of environmental protection. Thus, "[i]n contrast to the ESA, under which the substantive goals of an individual provision may have a more specific objective than the overarching goal of the statute and may be analyzed independently, §102 of NEPA cannot be separated from the statute's overarching purpose of environmental protection because it is designed to further that purpose." 420 F.3d at 945. The Court of Appeals offers nothing to show that the "goal" of requiring consideration of "alternatives" is not "substantive", nor that the requirement of §7 of the ESA can "be separated from the statute's overarching purpose" of species preservation. Had the Ninth Circuit complied with this Court's requirement that reference be had to "the particular provisions of law upon which the plaintiff relies", "not . . . to the overall purposes of the Act in question", it would never have reached the circular analysis of whether sub-provisions further overall purposes.

Nothing in *Bennett v. Spear* suggests that its rule requires an initial showing that "the particular provision of law" in issue has a "different purpose" than the overall purpose of the Act of which it is part" or is "separate" from, or not "designed to further that purpose". The plain purport of *Bennett v. Spear* is that the overall purpose of an Act is not a ground why a court may ignore additional "objectives" of subparts, implementation of which may protect a "concrete interest" of plaintiff. The Ninth Circuit's ruling that "[b]ecause the individual procedural provisions, including §102(2)(C), are intended to further the overarching goal of NEPA, to safeguard the environment, the provisions cannot be divorced from that broader purpose" (*Id.* at 945), is simply defiance of *Bennett v. Spear*.

The Ninth Circuit even more aggressively misconstrues *Friends of Boundary Waters Wilderness v. Dombeck*, 164 F.3d 1115 (8 Cir. 1999), in stating the Ninth Circuit's disagreement with it. "The Eighth Circuit rejected an argument that NEPA's general purpose of environmental protection infuses §102 with that same purpose." *Id.* at 941-942. "The Eighth Circuit apparently perceived that *Bennett v. Spear*'s directive to consider the particular provision at issue erected a bar that prevented NEPA's general purpose from affecting the zones of interest encompassed by NEPA's individual provisions. We disagree." *Id.* at 944. Both assertions cite 164 F.3d at 1127. In fact, nothing on page 1127 of 164 F.3d rejects, or even refers to, any such argument, or perceives any such bar. The Eighth Circuit says specifically on this page that "we need not consider whether the [plaintiffs] are in fact more concerned with economics than with the welfare of the physical environment." This must mean

that *both* concerns apply and that implementation of the particular one advances the general one. Neither eliminates the other. This is what 40 C.F.R. §1508.4 means by "interrelated".

The Ninth Circuit's suggestion that subsequent Eighth Circuit case law "means that *Friends of Boundary Waters* has come to stand for a broad principle that would encompass virtually any economic interest, no matter how remote" (*Id.* at 942), is certainly overwrought. The Ninth Circuit is unable to cite an instance in which any court in the Eighth Circuit accepted an economic interest which was "remote" from the concerns of a particular provision of NEPA.

CONCLUSIONS

The Ninth Circuit in the present case refuses to apply *Bennett v. Spear* to cases arising under NEPA and its subsections. The effect is to defeat the process intended by Congress of consideration of environmentally superior alternatives. Given the definition of "alternative" as environmentally preferable, those having proprietary interests in mining "alternatives" will never assert a geographic nexus which entails the environmental harm. As mining is an "economic" activity, the interest of proprietors of "alternatives" will always be "economic".

Had the Court of Appeals applied the well-established legal definition of "alternatives", it would have observed that its concern for unlimited standing is not only bootless, but within authorities of Congress and the agencies which a court may not invade. It would also

have observed that the disagreement it now states for the Ninth Circuit, with the Eighth Circuit, is insubstantial and unnecessary.

This Court should grant certiorari to resolve the conflict between the Circuits, and to ensure enforcement of its ruling in *Bennett v. Spear*.

RESPECTFULLY SUBMITTED,

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APPENDIX

APPENDIX
TABLE OF CONTENTS

1. *ASHLEY CREEK PHOSPHATE CO.., v. GALE NORTON, Secretary, United States Dept. of the Interior; NU-WEST INDUSTRIES, INC.., dba: Agrium Conda Phosphate Operations,* No. 04-35640 D.C. No. CV-03-00499-BLW MEMORANDUM DECISION (April 14, 2004).

2. *ASHLEY CREEK PHOSPHATE CO.., v. GALE NORTON, Secretary, United States Dept. of the Interior; NU-WEST INDUSTRIES, INC.., dba: Agrium Conda Phosphate Operations,* No. 04-35640 D.C. No. CV-03-00499-BLW JUDGMENT (April 14, 2004).

3. *ASHLEY CREEK PHOSPHATE CO.., v. GALE NORTON, Secretary, United States Dept. of the Interior; NU-WEST INDUSTRIES, INC.., dba: Agrium Conda Phosphate Operations,* No. 04-35640 D.C. No. CV-03-00499-BLW ORDER (June 29, 2004).

4. *ASHLEY CREEK PHOSPHATE CO.., v. GALE NORTON, Secretary, United States Dept. of the Interior; NU-WEST INDUSTRIES, INC.., dba: Agrium Conda Phosphate Operations,* No. 04-35640 D.C. No. CV-03-00499-BLW OPINION (August 22, 2005).

5. *ASHLEY CREEK PHOSPHATE CO.., v. GALE NORTON, Secretary, United States Dept. of the Interior; NU-WEST INDUSTRIES, INC.., dba: Agrium Conda Phosphate Operations,* No. 04-35640 D.C. No. CV-03-00499-BLW ORDER (October 28, 2005).

6. Administrative Procedure Act, 5 U.S.C. § 702. Right of Review.

7. National Environmental Policy Act, 42 §4332(2)(C)(iii).

TAB 1

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

ASHLEY CREEK PHOSPHATE CO., *Plaintiff,* v. GALE NORTON, Secretary, United States Department of the Interior; NU-WEST INDUSTRIES, INC., Agrium Conda Phosphate Operations, *Defendants.*	**U.S. COURTS** **FILED D.H.** **APR 14 2004** **Cameron S. Burke** **Clerk of Idaho** Civ. No. 03-0499-E-BLW MEMORANDUM DECISION

INTRODUCTION

The Court has before it motions to dismiss filed by defendants. The Court heard oral argument on April 13, 2004, and denied the motions from the bench. This decision will set forth the Court's reasoning in more detail.

ANALYSIS

In this case, plaintiff Ashley Creek Phosphate Co. brings a NEPA challenge to a decision by the BLM to

permit expansion of phosphate mining by defendant Nu-West. Nu-West mines phosphate in southeastern Idaho, and sends the phosphate to its Conda Plant near Soda Springs, Idaho, to be processed into fertilizer. In 2001, Nu-West made a proposal to the BLM to expand its existing mining operations so that it could continue to supply the Conda Plant with phosphate.

The BLM prepared an EIS to evaluate Nu-West's proposal. While the EIS was being prepared, Ashley Creek proposed an alternative for the BLM to consider in the EIS. That alternative proposed that Ashley Creek's phosphate reserves in Utah should be used to supply the Conda plant. Ashley Creek explains that "the most predictable market for use of Ashley Creek ore in fertilizer is the [Nu-West] Conda Plant." *See Brief of Ashley Creek* at p. 3.

This alternative, Ashley Creek asserts, was never considered by the BLM before it approved Nu-West's proposal in a Record of Decision (ROD) dated September 5, 2003. Ashley Creek's administrative appeal was rejected, and it filed this suit, alleging t hat the BLM violated NEPA by failing to consider its alternative.

To establish standing, Article III requires that Ashley Creek allege an "injury in fact" – an invasion of a legally protected interest that is concrete and particularized. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). Grafted by case law onto this constitutional limitation is a prudential limitation, requiring that Ashley Creek show more than a generalized grievance "shared in

substantially equal measure by all or a large class of citizens." *Warth v. Seldin*, 422 U.S. 490 (1975).

A further prudential limitation requires Ashley Creek to come within the zone of interests sought to be protected by NEPA. That zone of interests, the Ninth Circuit has held, does not include purely economic interests. *Nevada Land Action Ass'n v. U.S. Forest Service*, 8 F.3d 713, 716 (9th Cir. 1993). "The purpose of NEPA is to protect the environment, nor the economic interest of those adversely affected by agency decisions." *Id.*

Ashley Creek concedes that it "does not have an interest in the local Idaho environment." *See Brief of Ashley Creek* at p. 4. It claims, nevertheless, that it has standing because it has been injured by the BLM's failure to consider its alternative. This injury, however, is purely economic in nature. Ashley Creek sought approval from the BLM for a business opportunity, and the BLM's rejection has at most caused Ashley Creek financial rather than environmental harm. Such economic injury is not within the zone of interests protected by NEPA.

An argument similar to Ashley Creek's was rejected in *ANR Pipeline Co. v. F.E.R.C.*, 205 F.3d 403 (D.C.Cir. 2000). There, ANR challenged FERC's issuance of a license to its competitor, Nautilus, to build a gas pipeline. ANR claimed that FERC failed to consider its alternative proposal that would have allowed ANR to join in the Nautilus project. ANR stood there in much the same position as Ashley Creek stands here: Both were

aggrieved by an agency's rejection of a proposed business opportunity, and neither suffered any environmental injury. In ANR's case, the D.C. Circuit held that ANR lacked standing under NEPA because its claimed injury – that FERC failed to consider its proposed alternative – was economic in nature. *Id.* at 407-08.

The Court finds that case persuasive, although not binding. The *Nevada Land* case, however, is binding, and warrants a finding that Ashley Creek lacks standing.[1] The Court will therefore grant the motion to dismiss in a separate Judgment as required by Rule 59.

Dated this 14th day of April, 2004.

B. LYNN WINMILL
CHIEF JUDGE, U.S. DISTRICT COURT

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[1] At oral argument, Ashley Creek's counsel argued that if Ashley Creek did not have standing, nobody would have standing, implying that standing should be granted so that the BLM could be held accountable for failing to follow NEPA. A similar argument was rejected in *Lee v. State of Oregon*, 107 F.3d 1382, 1390 (9th Cir. 1997) (["T]he assumption that if [plaintiffs] have no standing to sue, no one would have standing, is not a reason to find standing.")

TAB 2

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

ASHLEY CREEK PHOSPHATE CO., *Plaintiff,* v. GALE NORTON, Secretary, United States Department of the Interior; NU-WEST INDUSTRIES, INC., Agrium Conda Phosphate Operations, *Defendants.*	**U.S. COURTS** **FILED D.H.** **APR 14 2004** **Cameron S. Burke** **Clerk of Idaho** Civ. No. 03-0499-E-BLW JUDGMENT

In accordance with the Memorandum Decision filed with this judgment,

NOW THEREFORE IT IS HEREBY ORDERED, ADJUDGED, AND DECREED, that the motions to dismiss (docket nos. 11 & 16) are GRANTED, an that this action is DISMISSED IN ITS ENTIRETY.

Dated this 14th day of April, 2004.

B. LYNN WINMILL
CHIEF JUDGE, U.S. DISTRICT COURT

TAB 3

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

ASHLEY CREEK PHOSPHATE CO., *Plaintiff-Appellant,* v. GALE NORTON, Secretary, United States Department of the Interior; NU-WEST INDUSTRIES, INC., Agrium Conda Phosphate Operations, *Defendants-Appellees.*	**US COURTS** **2004 JUN 30 9AM** **REC'D __ FILED** **___ CAMERON S. BURKE,** **CLERK, IDAHO** Civ. No. 03-0499-E-BLW ORDER

The Court has before it a motion to reconsider filed by Plaintiff. The Court can find no reason to reconsider its decision, and will therefore deny the motion.

NOW THEREFORE IT IS HEREBY ORDERED, that the motion to reconsider (docket no. 29) is DENIED.

Dated this 29th day of June, 2004.

B. LYNN WINMILL
CHIEF JUDGE, U.S. DISTRICT COURT

TAB 4

FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ASHLEY CREEK PHOSPHATE CO., *Plaintiff-Appellant,* v. GALE NORTON, Secretary, United States Department of the Interior; NU-WEST INDUSTRIES, INC., Agrium Conda Phosphate Operations, *Defendants-Appellees.*	No. 04-35640 D.C. No. CV-03-00499-BLW OPINION

Appeal form the United States District Court
For the District of Idaho
B. Lynn Winmill, District Judge, Presiding

Argued and Submitted
June 7, 2005 – Seattle, Washington

Filed August 22, 2005

Before: Warren J. Ferguson, Robert R. Beezer, and M. Margaret McKeown, Circuit Judges.

Opinion by Judge McKeown;
Partial Concurrence and Partial Dissent by Judge Beezer

SUMMARY

Environmental Law/Litigation and Procedure (Civil)

The court of appeals affirmed a judgment of the district court. The court held that a purely economic injury that is not intertwined with an environmental interest does not fall within the zone of interests protected by § 102(2)(C) of the National Environmental Policy Act (NEPA).

Appellant Ashley Creek Phosphate Company, a Utah-based phosphate supplier, filed a complaint in district court under NEPA, challenging as deficient an environmental impact statement (EIS) that failed to consider Ashley Creek as an alternate supplier of phosphate for a mining project in Idaho. Ashley Creek had no environmental stake in the phosphate mining project, which was some 250 miles from the phosphate Ashley Creek controlled; its only interest was admittedly an economic one. The district court dismissed the suit for lack of standing, reasoning that Ashley Creek's interest was purely economic and economic interests did not fall within the zone of interests protected by NEPA.

Ashley Creek appealed.

[1] Article III standing requires as an irreducible

minimum that the plaintiff show, among other things, an injury in fact. [2] NEPA is a procedural statute and procedural injuries frequently suffice for standing in the NEPA context. A plaintiff asserting a procedural injury does not have standing absent a showing that the procedures in question are designed to protect some threatened concrete interest of his that is the ultimate basis of his standing. [3] For claims bought under NEPA, the Ninth Circuit has described this "concrete interest" test as "requiring a "geographic nexus" between the individual asserting the claim and the location suffering an environmental impact. [4] Ashley Creek lacked any judicially recognizable (11076) geographic nexus to the area that would be affected by mining that was 250 miles away in Idaho. [5] It had to be held that the geographic disconnect between Ashley Creek and the proposed mining project precluded Ashley Creek from alleging a procedural injury sufficient to confer standing.

[6] The prudential standing analysis examines whether a particular plaintiff has been granted a right to sue by the statute under which he or she brings suit. [7] Because NEPA does not provide for a private right of action, plaintiffs challenging an agency action based on NEPA must do so under the Administrative Procedure Act, under which the interest sought to be protected by the complainant must be arguably within the zone of interests to be protected or regulated by the statute in question. [8] Purely economic interests do not fall within NEPA's zone of interests. [9] Under this long-standing rule against purely economic interests falling within NEPA's zone of interests, Ashley Creek failed to

establish prudential standing. Ashley Creek's sole interest was in selling phosphate; Ashley Creek did not link its pecuniary interest to the physical environment or to the environmental impacts of the project evaluated in the EIS.

[10] An examination of § 102(2)(C) revealed that, while it acknowledges economic concerns, those economic concerns are not divorced from environmental considerations. [11] Nothing in the text of § 102(2)(C) suggested that an EIS must address an economic concern that is not tethered to the environment. [12] Although 40 C.F.R. § 1508.14 indicates that economic considerations may be relevant, those economic effects matter only when they are interrelated with natural or physical environmental effects. Thus, to the extent regulations clarified § 102(2)(C)'s zone of interests, they demonstrated that purely economic considerations are not within that zone. [13] It had to be held that a purely economic injury that is not intertwined with an environmental interest does not fall within § 102's zone of interests. The district court's dismissal of (11077) Ashley Creek's challenge for lack of standing had to be affirmed.

Judge Beezer concurred, writing that because Ashley Creek failed to establish constitutional standing, deciding whether the prudential standing doctrine forecloses any plaintiff asserting a purely economic injury from bringing suit under § 102 of NEPA should be left for another day.

COUNSEL

E. Craig Smay, E. Craig Smay, P.C., Salt Lake City, Utah, for the appellant.

Zach C. Miller, Davis Graham & Stubbs, Denver, Colorado, for the appellees.

Robert C. Grisham, Assistant united States Attorney, Boise, Idaho, for the appellees.

OPINION

McKEOWN, Circuit Judge:

The issue we address is whether Ashley Creek Phosphate Company has standing to bring this action under the National Environmental Policy Act ("NEPA"). Ashley Creek has no environmental stake in the phosphate mining project at issue, which is some 250 miles from the phosphate Ashley Creek controls. Indeed, it only interest is an economic one: if the project does not go forward, Ashley Creek speculates that it might become an alternate supplier of phosphate. Because it has shown neither an injury in fact nor an interest within the zone of interests protected by section 102(2)(C) of NEPA, [1]

[1] By convention, throughout the opinion we refer to the relevant provision of NEPA as it was enumerated in the original Act, rather than by its current section designation in the United States Code.

Ashley Creek lacks standing to bring this NEPA challenge. (11078)

PROCEDURAL AND FACTUAL BACKGROUND

Agrium Conda Phosphate Operations manufactures phosphate-based fertilizer at the Conda Phosphate Processing Plant ('the Plant") near Soda Springs, Idaho. Agrium historically has obtained phosphate for the Plant. With the Rasmussen Ridge Mine nearing depletion. Agrium began exploring alternate sources of phosphate in the late 1990s.

One option that Agrium initially considered was to supply the Plant with phosphate from deposits near Vernal, Utah ("Vernal deposits"). The Vernal deposits are controlled by Ashley Creek, which leases large portions of the deposits from the State of Utah. Agrium contacted Ashley Creek to find out whether it could supply phosphate for the Plant, but after investigating the cost of mining and transporting phosphate from the Vernal deposits, Agrium decided that obtaining phosphate from Ashley Creek was too expensive.

Agrium turned its attention to expanding its existing operations at the Rasmussen Ridge Mine into North Rasmussen Ridge where it had not previously mined. Much of the land on North Rasmussen Ridge is administered by the Bureau of Land Management ("BLM"), which required Agrium to submit a mine and

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Section 102 is codified at 42 U.S.C. § 4332.

reclamation plan. The BLM determined that an Environmental Impact Statement ("EIS") was necessary to evaluate the potential impact of exposing harmful materials, such as selenium, and possible harm to the Canada Lynx, a species recently listed as "threatened" under the Endangered Species Act. The exposure of selenium and other elements contained in phosphate increases the potential for release of those elements into the water and soil. (11079)

The BLM prepared a draft EIS that considered three alternatives, including the proposed action – mining at North Rasmussen Ridge – and a no action alternative. In response, Ashley Creek submitted a latter commenting that the draft EIS was deficient because it did not consider as an alternative the possibility of mining the Vernal deposits that Ashley Creek controls. Ashley Creek wrote that the Vernal deposits were not only cost-effective, but were also environmentally superior to the proposed action.

In declining to include mining the Vernal deposits as an alternative in the final EIS, the BLM explained that its responsibility was t o respond to the proposed mining expansion on North Rasmussen Ridge, not to compare various phosphate supplies:

> [The BLM's responsibility is to] either approve the plan of operations as propose, modify the mine plan with alternatives, or disapprove the operation with the No Action Alternative. As such, a comparative analysis of the cost or other

> environmental factors of mining North Rasmussen Ridge with other viable phosphate reserves is not within the scope of this analysis. The fundamental question to be decided by this NEPA analysis is not how Agrium's Conda Fertilizer Plant will be fed, but if the North Rasmussen Ridge reserve will be mined at this time.

The BLM also observed that Agrium's investigation indicated that the Vernal deposits were not a viable supply of phosphate because Ashley Creek had not developed the reserves, had no mine plan, and lacked a host of other conditions for mining.

Following the issuance of the final EIS, Ashley Creek filed a complaint in the district court alleging that the alternatives analysis in the EIS was deficient because it failed to consider supplying the Plant with phosphate from the Vernal deposits. The district court dismissed the suit for lack of standing, (11080) reasoning that Ashley Creek's interest was purely economic and economic interests do not fall within the zone of interests protected by NEPA.

DISCUSSION

To resolve this appeal, we must address the threshold question of standing. The Supreme Court has described standing as being "[i]n essence the question . . . whether the litigation is entitled to have the court decide the merits of the dispute or of particular issues." *Warth v. Seldin*,

422 U.S. 490, 498 (1975). Because Article III of the Constitution limits the role of the judiciary to hearing only "cases" or "controversies," constitutional standing ensures that a plaintiff has sufficient stake in a case to establish a "case" or "controversy." *See United Food & Commercial Workers Union Local 751 v. Brown Group, Inc.*, 517 U.S. 544, 551 (1996). Grafted on top of this constitutional backbone are prudential standing requirements consisting of "several judicially self-imposed limits on the exercise of federal jurisdiction." *Id.* (internal quotation marks and citation omitted). Thus, our standing analysis entails an examination of both constitutional and non-constitutional requirements. *See City of Sausalito v. O'Neill*, 386 F.3d 1186, 1197 (9th Cir. 2004). We review a district court's determination of standing de novo. *Id.* at 1196-97.

I. ARTICLE III STANDING

[1] Because Article III standing is based on constitutional limits on the federal courts' power, U.S. Const. art. III § 2, Article III standing requires as an "irreducible minimum," *Brown Group, Inc.*, 517 U.S. at 551, that the plaintiff show (1) an injury in fact that is both (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) that the injury is fairly traceable to the challenged action of the defendant; and (3) a likelihood that the injury will be redressed by a favorable decision. *Friends of the Earth, Inc.* (11081) *v. Laidlaw Envtl. Servs.*, 528 U.S. 167, 180-81 (2000). The injury in fact prong is determinative of this appeal.

[2] NEPA is a procedural statute, and thus it is not

surprising that procedural injuries frequently suffice for standing in the NEPA context. *See e.g., Citizens for Better Forestry v. United States Dep't of Agric.*, 341 F.3d 961, 970-972, 978 (9th Cir. 2003) (plaintiffs had standing when they alleged procedural injury of deprivation of opportunity to comment on environmental reviews); *see also, Lujan v. Defenders of Wildlife*, 504 U.S. 555, 573 n.8 (1992) (plaintiff "assuredly can" enforce procedural rights). Abut a plaintiff asserting a procedural injury does not have standing absent a showing that the "procedures in question are designed to protect some threatened concrete interest of his that is the ultimate basis of his standing." *Lujan*, 504 U.S. at 573 n.8.[2] A free-floating assertion of a procedural violation, without a concrete link to the interest protected by the procedural rules, does not constitute an injury in fact. *See id.* at 572-73 & nn.7-8; *see also City of Sausalito*, 386 F.3d at 1197 (plaintiff alleging a procedural (11082) injury must also assert a concrete interest that is threatened by failure to comply with the procedural requirement); *Cantrell v. City of Long Beach*, 241 F.3d 674, 679 (9th Cir. 2001) (plaintiff alleging procedural injury must show that the procedures protect a concrete interest).

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[2] Our analysis of a procedural injury under NEPA typically involves three inquiries: 1) whether the agency violated certain procedural rules, 2) whether those rules protect the plaintiff's concrete interests, and 3) whether it is reasonably probable that the challenged action will threaten the concrete interests. *City of Sausalito*, 386 F.3d at 1197 (citing *Citizens for Better Forestry*, 341 F.3d at 969-70). Because the first inquiry is closely intertwined with the merits of Ashley Creek's case, which we cannot decide unless Ashley Creek has standing, we focus on the second question.

[3] For claims brought under NEPA, "we have described this 'concrete interest' test as requiring a 'geographic nexus' between the individual asserting the claim and the location suffering an environmental impact." *Cantrell*, 241 F.3d at 679 (citing *Douglas County v. Babbitt*, 48 F.3d 1495, 1500 n.5 (9th Cir. 1995)). Accordingly, plaintiffs who use the area threatened by a proposed action or who own land near the site of a proposed action have little difficulty establishing a concrete interest. *See, e.g., Citizens for Better Forestry*, 341 F.3d at 971 (plaintiffs established geographic nexus by showing that they used and enjoyed national forests affected by proposed national forest management policy); *Kootenai Tribe of Idaho v. Veneman*, 313 F.3d 1094, 1112 (plaintiffs with ownership interests in lands adjacent to forests affected by proposed action established geographic nexus).

[4] Ashley Creek, whose phosphate leases are in Utah, lacks any judicially recognizable geographic nexus to the area that would be affected by mining on the North Rasmussen Ridge, which is approximately 250 miles away in Idaho. Although 250 miles is not some magic numerical distance beyond which a party is too far removed from the immediate environmental impact of a project to assert standing, we observe that this distance prevents an assumption, in this case, that Ashley Creek is geographically connected to North Rasmussen Ridge. Ashley Creek has not shown that its phosphate fields are tied to the location of the proposed mining or that the impacts of the mining will affect its property interests.

Contra Kootenai Tribe of Idaho, 313 F.3d at 1112 (plaintiffs had ownership interests in lands adjacent to national forests that could be affected by implementation of Forest Service rule). Nor has Ashley Creek alleged that it uses, appreciates, (11083) or in any way has an interest in the region surrounding North Rasmussen Ridge. *Contra Citizens for Better Forestry*, 341 F.3d at 971 (members of plaintiff organization used and enjoyed the forests at issue and, consequently, alleged a concrete interest).

What is missing in this case is a legally sufficient link between Ashley Creek's interest – getting the BLM to analyze unrelated phosphate deposits 250 miles away from the proposed mines – and NEPA's procedural requirement that agencies analyze the environmental impact of the proposed mining at a specific site, North Rasmussen Ridge. Not only is the geographic link missing, the substantive concrete injury is wholly absent.

Under Ashley Creek's theory, any owner of a phosphate mine, whether located in Alaska, Utah, or Florida, would have standing to challenge the EIS. Why stop there? Taking Ashley Creek's framework one step further, the BLM would be obligated not only to analyze the environmental suitability of unrelated phosphate deposits, but also phosphate substitutes that might be more eco-friendly.

[5] Indeed, Ashley Creek is strikingly similar to Justice Scalia's example of the kinds of plaintiffs who cannot assert procedural injuries: "persons who have no concrete

interests affected – persons who live (and propose to live" at the other end of the country from the [proposed project]." *Lujan*, 504 U.S. at 572 n.7. Without evidence that Ashley Creek's leases have some geographic nexus to the proposed mines, they are for standing purposes "at the other end of the country" from those mines. We therefore hold that the geographic disconnect between Ashley Creek and the proposed mining project at North Rasmussen Ridge precludes Ashley Creek from alleging a procedural injury sufficient to confer standing.

II. PRUDENTIAL STANDING

[6] Not only does Ashley Creek fail to satisfy the injury in fact component of Article III standing it fails to meet the (11084) zone of interests test, a prudential standing requirement. The prudential standing analysis examines whether "a particular plaintiff has been granted a right to sue by the statute under which he or she brings suit." *City of Sausalito*, 386 F.3d at 1199. The bottom line is that Ashley Creek's interest in the EIS analysis is purely financial. NEPA, on the other hand, is directed at environmental concerns, not at business interests. For reasons closely related to its lack of a concrete injury, Ashley creek's challenge does not fall within NEPA's zone of interests. As an alternate basis for our decision, we hold that Ashley Creek lacks standing under the prudential standing requirement.

[7] Because NEPA does not provide for a private right of action, *see, e.g., Sierra Club v. Penfold*, 857 F.2d 1307, 1315 (9th Cir. 1988), plaintiffs challenging an agency

action based on NEPA must do so under the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 551 *et seq.* Under the APA, "a person . . . adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." 5 U.S.C. § 702. The Supreme Court has interpreted this section of the APA as imposing a prudential standing requirement that "the interest sought to be protected by the complainant [must be] arguably within the zone of interests to be protected or regulated by the statute . . . in question." *Ass'n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 153 (1970).

The zone of interests test is not intended to impose an onerous burden on the plaintiff and "is not meant to be especially demanding." *See Clarke v. Sec. Indus. Ass'n*, 479 U.S. 388, 399 (1987). But when, as here, the plaintiff is not "the subject of the contested regulatory action, the test denies a right of review if the plaintiff's interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit." *Id.* (11085)

[8] We have long described the zone of interests that NEPA protects as being environmental. *See, e.g., Nevada Land Action Ass'n v. United States forest Serv.*, 8 F.3d 713, 716 (9th Cir. 1993) ("The purpose of NEPA is to protect the environment, not the economic interests of those adversely affected by agency decisions."); *Port of Astoria v. Hodel*, 595 F.2d 467, 475 (9th Cir. 1979) (purely financial interests are outside of NEPA's zone of interests). Accordingly, we have consistently held that purely

economic interests do not fall within NEPA's zone of interests: "[A] plaintiff who asserts purely economic injuries does not have standing to challenge an agency action under NEPA." *Nevada Land Action Ass'n*, 8 F.3d at 716; *see also Ranchers Cattlemen v. United States Dep't of Agric.*, 2005 WL 1731761 at *18 (9th Cir. July 25, 2005) (an economic injury alone will not support a claim under NEPA); *Western Radio Servs. Co. v. Espy*, 79 F.3d 896, 903 (9th Cir. 1996) (holding that injuries that were "only pecuniary losses and frustrated financial expectations that [were] not coupled with environmental considerations" were "outside of NEPA's zone of interests").

[9] Under this long-standing rule against purely economic interests falling within NEPA's zone of interests, Ashley Creek fails to establish prudential standing. Rather, Ashley Creek has never claimed to be protecting an interest that is even remotely intertwined with the environment. Ashley Creek's sole interest is in selling phosphate to Agrium; Ashley Creek has not linked its pecuniary interest to the physical environment or to the environmental impacts of the project evaluated in the EIS. As the district court noted, Ashley Creek conceded as much, stating in its brief before that court that it "does not have an interest in the local Idaho environment."

Ashley Creek attempts to escape the conclusion that its bare financial interest falls outside NEPA's zone of interests (11086) by arguing that the rule prohibiting those with purely economic interests from suing under NEPA ceases to apply once an agency decides to move forward

with an EIS. Ashley Creek's argument depends on a determination that § 102 – the provision of NEPA that sets out the content requirements of the environmental report once an agency determines that an EIS is necessary – protects purely economic interests.[3] That determination, in turn, would require us to conclude that, for purposes of standing, there is a distinction between cases involving NEPA's threshold applicability (i.e., whether an EIS is necessary) and cases in which an EIS is clearly required.

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[3] Section 102 provides, in pertinent part, that:

> The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this chapter, and (2) all agencies of the Federal Government shall-
>
> . . . .
>
> (C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on-
>
> (i) the environmental impact of the proposed action,
> (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,
> (iii) alternatives to the proposed action,
> (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and
> (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

In the end, Ashley Creek's theory is undone by the structure of NEPA and the purpose of § 102. Section 102 does not support this bifurcated reading of the statute. (11087)

Ashley Creek's argument springs from the Supreme Court's decision in *Bennett v. Spear*, 520 U.S. 154 (1997), in which the Court considered the zone of interests protected by a different environmental statute, the Endangered Species Act ("ESA"). The Court clarified that whether a plaintiff's interest is within the zone of interests protected by a statute "is to be determined not by reference to the overall purpose of the Act in question (here, species preservation), but by reference to the particular provision of law upon which the plaintiff relies." *Id.* at 175-76. In *Bennett*, the particular provision at issue was § 7 of the ESA, 16 U.S.C. § 1536, which requires each federal agency to insure that any action it authorizes, funds, or carries out "is not likely to jeopardize the continued existence of any endangered species or threatened species . . . ." 16 U.S.C. § 1536(a)(2). When evaluating potential effects on endangered species, agencies must "use the best scientific and commercial data available." *Id.*

The Court concluded that the language requiring the use of data indicated that one objective of § 7 was to avoid "needless economic dislocation produced by agency officials zealously but unintelligently pursuing their environmental objectives." *Bennett*, 520 U.S. at 176-77. The purpose of requiring agencies to use high quality data, the Court reasoned, is to "ensure that the ESA not be

implemented haphazardly" in ways that cause unnecessary economic harm. *Id.* Because § 7 protected economic interests, the Court held that plaintiffs who asserted economic interests fell within the § 7's zone of interests. *Id.* at 177.

Applying *Bennett*, the Eighth Circuit examined the same provision of NEPA on which Ashley Creek relies, § 102. *Friends of Boundary Waters Wilderness v. Dombeck*, 164 F.3d 1115 (8th Cir. 1999). The court followed *Bennett*'s instruction to examine the particular statutory provision at issue and determined that § 102 encompassed both environmental and economic concerns. *Id.* at 1125-26. The court paid special attention to the regulations that implement § 102, (11088) observing that those regulations require an EIS to include economic effects that are interrelated with physical environmental effects. *Id.* at 1126 (quoting 40 C.F.R. § 1508.14).

The Eighth Circuit rejected an argument that NEPA's general purpose of environmental protection infuses § 102 with that same purpose. *Id.* at 1127. Instead, the court distinguished between cases involving NEPA's applicability and cases where NEPA requires an EIS, and reasoned that the general purpose applies only in the threshold applicability cases, but does not govern the specific provisions of NEPA that control the EIS process. *Id.* at 1127. The court concluded that plaintiffs had standing when they claimed that an EIS failed to sufficiently consider the impact of an agency action on local economies. *Id.* at 1126-27.

We agree that *Bennett* instructs us to define the zone of interests with reference to the specific provision of the statute at issue, but we disagree with our sister circuit that § 102 protects purely economic interests or that it can be severed from NEPA's overarching purpose. As Agrium points out, *Friends of the Boundary Waters* is factually distinguishable from this case because the plaintiffs there conducted business on and relied upon the lands that would be affected by the agency action. *Id.* at 1120, 1126. Those plaintiffs also alleged that the agency action would hamper their ability to enjoy the wilderness area involved. *Id.* at 1126. In contrast, Ashley Creek has not alleged any tie to the lands that would be affected by the BLM's decision to permit mining.

We agree that *Friends of Boundary Waters* can be persuasively distinguished on these factual differences. Nonetheless, we focus on our disagreement with the Eighth Circuit's reasoning because subsequent Eighth Circuit cases have interpreted *Friends of Boundary Waters* as establishing that "even purely economic interests may confer standing under NEPA if the particular NEPA provision giving rise to the plaintiff's suit evinces a concern for economic considerations." (11089) *Rosebud Sioux Tribe v. McDivitt*, 286 F.3d 1031, 1038 (8th Cir. 2002); *see also Cent. South Dakota Coop. Grazing Dist. v. United States Dep't of Agric.*, 266 F.3d 889, 895-896 (8th Cir. 2001) ("[O]nce [NEPA's] procedures have been invoked, a plaintiff can assert an injury arising from the agency's failure to consider NEPA's particular purposes or provisions, which might include economic considerations."). This reading means that *Friends of*

Boundary Waters has come to stand for a broad principle that extends beyond the facts of that case and would encompass virtually any economic interest, no matter how remote. It is on this open-ended and expansive interpretation of "purely economic interests" that we part company with the Eight Circuit.

[10] An examination of § 102(2)(C) reveals that, while it acknowledges economic concerns, those economic concerns are not divorced from environmental considerations. In other words, § 102(2)(C) does not set out a *purely* economic factor, unconnected to environmental concerns. Section 102(2)(C) requires all federal agencies to:

> include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on-
>
> (i) the environmental impact of the proposed action,
> (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,
> (iii) alternatives to the proposed action,
> (iv) the relationship between local short-term uses of man's environment and the (11090) maintenance and enhancement of long-term productivity, and
> (v) any irreversible and irretrievable

> commitments of resources which would be involved in the proposed action should it be implemented.

In interpreting the statute, it is useful to start at the beginning. The EIS itself is triggered by a "major Federal action[ ] that will significantly affect the quality of the human environment." NEPA § 102(2)(C) ("[A]ll agencies of the Federal Government shall . . . include in every recommendation or report on . . . major Federal actions significantly affecting the quality of the human environment, a detailed statement" on the environmental impact of the project). Thus, the human environment is the overarching principle driving the provision.

The statute then goes on to list what an EIS must contain. The first two subsections, §§ 102(2)(C)(i) and (ii), focus specifically on environmental effects – the environmental impact and adverse environmental effects. The third factor simply requires the EIS to contain "alternatives to the proposed action." § 102(2)(C)(iii). The final subsection speaks to commitment of resources. All of these parts of the list are infused with environmental considerations, leaving no room for economic interests divorced from the environment.

[11] While the use of the word "productivity" in subsection (iv) might be construed as requiring agencies to consider economic concerns, that provision requires a statement, not of economic interests, but rather of the *relationship* between uses of the *environment* and productivity that are not intertwined with the environment.

In short, nothing in the text of § 102(2)(C) suggests that an EIS must address an economic concern that is not tethered to the environment. (11091)

This conclusion is not surprising given that, for more than a quarter century, courts have understood the purpose of § 102(2)(C) as protecting the environment. *See e.g., Weinberger v. Catholic Action of Hawaii/Peace Educ. Project*, 454 U.S. 139, 143 (1981) (explaining that the "twin aims" of § 102(2)(C) are "to inject environmental considerations into the federal agency's decisionmaking process" and "to inform the public t hat the agency has considered environmental concerns"); *Andrus v. Sierra Club*, 442 U.S. 347, 350 (1979) ("The thrust of § 102(2)(C) is . . . that environmental concerns be integrated into the very process of decisionmaking."). The Supreme Court has counseled that the "theme of § 102 is sounded by the adjective 'environmental,'" which means that NEPA does not require an agency to assess all impacts of a project, only those that have a "reasonably close causal relationship" with "a change in the physical environment." *Metropolitan Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 772, 774 (1983); *see also Ranchers Cattlemen*, 2005 WL 1731761 at *19 (because plaintiffs failed to allege a connection between the asserted injury and physical environment, the injury fell outside of NEPA's zone of interests).

[12] The regulatory definition of "human environment," which the Eighth Circuit saw as persuasive evidence that § 102(2)(C) protects economic interests, *see Friends of the Boundary Waters*, 164 F.3d at 1125-26

(citing 40 C.F.R. § 1508.14),[4] is consistent with our interpretation. The regulation states that: (11092)

> economic or social effects are not intended by themselves to require preparation of an environmental impact statement is prepared and economic or social and natural or physical environmental effects are interrelated, then the environmental impact statement will discuss all of these effects on the human environment.

40 C.F.R. § 1508.14. Although this regulation indicates that economic considerations may be relevant, those economic effects matter only when they are "*interrelated*" with "natural or physical environmental effects." *Id.* (emphasis added). The regulation goes a step further and clarifies that economic effects alone do not require the preparation of an EIS. *Id.* ("Economic . . . effects are not intended by themselves to require preparation of an [EIS]."). Thus, to the extent regulations clarify § 102(2)(C)'s zone of interests, they demonstrate that purely

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[4] The D.C. Circuit criticized the Eighth Circuit's use of regulations to "extend prudential standing beyond the class of persons Congress intends." *Town Stratford v. Fed. Aviation Admin.*, 285 F.3d 84, 89 (D.C. Cir. 2002). We need not decide here whether relying on regulations to define the zone of interests is appropriate, but we agree with the D.C. Circuit that courts should not use regulations to expand the zone of interests beyond what Congress intended. Here we conclude that the statutory text and the regulations are consistent: both permit consideration of economic interests. We discuss the regulations only to explain yet another reason why we decline to follow the reasoning of *Friends of the Boundary Waters*.

economic considerations are not within that zone. *See also Town of Stratford*, 285 F.3d at 89 (interpreting the regulation as meaning that economic effects are not intended by themselves to require an EIS).

If the text of § 102(2)(C) were not enough to demonstrate that the section does not protect purely economic interests, that conclusion is strengthened by the impossibility of divorcing § 102 from the overall purpose of NEPA. Ashley Creek urges us to conclude otherwise, relying on the statement in *Friends of the Boundary Waters* that

> although . . . the sweeping purposes of NEPA do not, as a threshold matter, bring NEPA's procedures into play unless an environmental injury is at stake, *Bennett* indicates that once those procedures have been invoked, the plaintiffs can assert an injury arising from the agency's failure to take into consideration the particular purposes of provisions of . . . NEPA.

164 F.3d at 1127. The Eighth circuit apparently perceived that *Bennett's* directive to consider the particular provision at issue erected a bar that prevented NEPA's general purpose from affecting the zones of interests encompassed by NEPA's individual provisions. We disagree.

The Supreme Court's holding in *Bennett* that the general purpose of the ESA (species preservation) was different than the specific purpose of § 7 of the ESA

(preventing needless economic dislocation), *see Bennett*, 520 U.S. at 176-77, does not translate into the conclusion that the general and specific purposes of all statutes are different. The scope of the zone of interests varies according to the provision of law at issue, *id.* at 163, and NEPA and the ESA are different statutes that create different zones of interests. Whereas § 7 of the ESA establishes specific normative requirements, each section of NEPA is a purely procedural one that furthers the general purpose of the statute. *See Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350-51 & 351 n.14 (1989) (contrasting NEPA's procedural requirements with the substantive requirements of § 7 of the ESA). In contrast to the ESA, under which the substantive goals of an individual provision may have a more specific objective than the overarching goal of the statute and may be analyzed independently, § 102 of NEPA cannot be separated from the statute's overarching purpose of environmental protection because it is designed to further that purpose.

The overall purpose of NEPA is to declare a national commitment to protecting and promoting environmental quality. *Id.* at 348; 42 U.S.C. § 4331(a). Each of NEPA's various procedural provisions is designed to further that goal of environmental protection. *Robertson*, 490 U.S. at 348 (stating that to ensure that the commitment to environmental protection is infused into the federal government's actions, NEPA creates, among other 'action-forcing procedures,' the EIS requirement). In short, "[t]he sweeping policy goals [of protecting the environment] announced in § 101 of NEPA are . . .

realized (11094) through a set of 'action-forcing' procedures that require that agencies take a 'hard look' at environmental consequences." *Id.* at 350 (citation omitted). Because the individual procedural provisions, including § 102(2)(C), are intended to further the overarching goal of NEPA, to safeguard the environment, the provisions cannot be divorced from that broader purpose. Thus "it makes little difference whether the court directs its attention to the purpose of [§ 102(2)(C), are intended to further the overarching goal of NEPA, to safeguard the environment, the provisions cannot be divorced from that broader purpose. Thus, "it makes little difference whether the court directs its attention to the purpose of [§ 102(2)(C)], or the purpose of NEPA itself. The purpose is one and the same: protection of the environment." *Arizona Cattle Growers' Ass'n v. Carwright*, 29 F.Supp. 2d 1100, 1109 (D. Ariz. 1998).

[13] Contrary to Ashley Creek's suggestion, for purposes of determining standing predicated on a purely economic interest, NEPA does not support a distinction between cases involving NEPA's threshold applicability and cases involving evaluation of the EIS process. In light of the purpose of § 102(2)(C) – protection of the environment – and the specific statutory requirements for the content of an EIS, we hold that a purely economic injury t hat is not intertwined with an environmental interest does not fall within § 102's zone of interests. Having failed to establish either an injury in fact or t hat its interests are within the zone of interests protected by § 102(2)(C), we affirm the district court's dismissal of Ashley Creek's challenge for lack of standing.

AFFIRMED.

BEEZER, Circuit Judge, concurring in part and concurring in the judgment:

I concur in the judgment and Part I of the opinion of the court. Because Ashley Creek has failed to establish constitutional standing, I would leave for another day for deciding whether the prudential standing doctrine forecloses *any* plaintiff asserting a purely economic injury from bringing suit (11096) under § 102(2) of NEPA. *Compare Court Op., supra* at 11082 ("The injury in fact prong [of the Article III standing analysis] is determinative of this appeal.") *with Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 39 n.19 (1976) (determination that petitioners lacked constitutional standing rendered consideration of the "zone of interest" test unnecessary).

TAB 5

FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ASHLEY CREEK PHOSPHATE CO., *Plaintiff-Appellant,* v. GALE NORTON, Secretary, United States Department of the Interior; NU-WEST INDUSTRIES, INC., Agrium Conda Phosphate Operations, *Defendants-Appellees.*	**FILED 10/28/2005 CATHY A. CATTERSON, CLERK, U.S. COURT OF APPEALS** No. 04-35640 D.C. No. CV 03-00499-BLW District of ID, Boise ORDER

Before: FERGUSON, BEEZER, and McKEOWN, Circuit Judges.

The panel has voted to deny the petition for panel rehearing and to deny the petition for rehearing en banc.

The full court has been advised of the petition for rehearing and rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for panel rehearing and the the petition for rehearing en banc are denied.

TAB 6

5 U.S.C. § 702. Right of review

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States: *Provided*, That any mandatory or injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance. Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

TAB 7

§ 4332. Cooperation of agencies; reports; availability of information; recommendations; international and national coordination of efforts.

The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this chapter, and (2) all agencies of the Federal Government shall –

. . . .

(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on-

(i) the environmental impact of the proposed action,
(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,
(iii) alternatives to the proposed action,
(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

(3)

Supreme Court, U.S.
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No. 05-1209

In the Supreme Court of the United States

ASHLEY CREEK PHOSPHATE CO., PETITIONER

v.

P. LYNN SCARLETT,
ACTING SECRETARY OF THE INTERIOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner, a phosphate mining company located in Utah, has standing to bring a National Environmental Policy Act challenge to an environmental impact statement assessing the environmental effects of a fertilizer manufacturer's proposed phosphate mining operation in Idaho, when petitioner alleges injury only to its competitive economic interests.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statement 2
Argument 6
Conclusion 16

TABLE OF AUTHORITIES

Cases:

ASARCO, Inc. v. *Kadish*, 490 U.S. 605 (1989) 10
Allen v. *Wright*, 468 U.S. 737 (1984) 10
Andrus v. *Sierra Club*, 442 U.S. 347 (1979) 12
Bennett v. *Spear*, 520 U.S. 154 (1997) 7, 11, 13
Central S. D. Coop. Grazing Dist. v. *Secretary of the U.S. Dep't of Agric.*, 266 F.3d 889 (8th Cir. 2001) ... 6, 15
Friends of the Boundary Waters Wilderness v. *Dombeck*, 164 F.3d 1115 (8th Cir. 1999) 5, 14
Inland Empire Pub. Lands Council v. *United States Forest Serv.*, 88 F.3d 754 (9th Cir. 1996) 2
Izumi Seimitsu Kogyo Kabushiki Kaisha v. *U.S. Philips Corp.*, 510 U.S. 27 (1993) 7
Kleppe v. *Sierra Club*, 427 U.S. 390 (1976) 2
Lujan v. *Defenders of Wildlife*, 504 U.S. 555 (1992) .. 6, 8, 9
Metropolitan Edison Co. v. *People Against Nuclear Energy*, 460 U.S. 766 (1983) 12
Nevada Land Action Ass'n v. *United States Forest Serv.*, 8 F.3d 713 (9th Cir. 1993) 12
Port of Astoria v. *Hodel*, 595 F.2d 467 (9th Cir. 1979) ... 12

Cases—Continued: Page

Ranchers Cattlemen Action Legal Fund United Stockgrowers of Am. v. *United States Dep't of Agric.*, 415 F.3d 1078 (9th Cir. 2005) 12

Robertson v. *Methow Valley Citizens Council*, 490 U.S. 332 (1989) 2, 13

Rosebud Sioux Tribe v. *McDivitt*, 286 F.3d 1031 (8th Cir. 2002), cert. denied, 537 U.S. 1188 (2003) 6, 15

Sausalito v. *O'Neill*, 386 F.3d 1186 (9th Cir. 2004) 15

Simon v. *Eastern Ky. Welfare Rights Org.*, 426 U.S. 26 (1976) 10

Steel Co. v. *Citizens for a Better Env't*, 523 U.S. 83 (1998) 7

Strycker's Bay Neighborhood Council, Inc. v. *Karlen*, 444 U.S. 223 (1980) 2

Taubman Realty Group Ltd. P'ship v. *Mineta*, 320 F.3d 475 (4th Cir. 2003) 12

Town of Stratford v. *Federal Aviation Admin.*, 285 F.3d 84 (D.C. Cir. 2002) 12

Valley Forge Christian Coll. v. *Americans United for Separation of Church & State*, 454 U.S. 464 (1982) ... 11

Weinberger v. *Catholic Action of Hawaii/Peace Educ. Project*, 454 U.S. 139 (1981) 12

Wisniewski v. *United States*, 353 U.S. 901 (1957) 15

Constitution, statutes and regulations:

U.S. Const. Art. III 4, 6, 7, 8, 9

Endangered Species Act of 1973 § 7, 16 U.S.C. 1536 13

16 U.S.C. 1536(a)(2) 13

Statutes and regulations—Continued: Page

National Environmental Policy Act of 1969, 42 U.S.C. 4321 *et seq.*:
§ 2, 42 U.S.C. 4321 2
§ 102(2)(C), 42 U.S.C. 4332(2)(C) ..... *passim*
40 C.F.R.:
Section 1501.1(c) 2
Section 1501.3 2
Section 1501.4 2
Section 1501.4(e) 3
Section 1508.13 3
Section 1508.14 14

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. Tab 4) is reported at 420 F.3d 934. The opinion of the district court (Pet. App. Tab 1) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 22, 2005. A petition for rehearing was denied on October 28, 2005 (Pet. App. Tab 5). The petition for a writ of certiorari was filed on January 19, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Congress enacted the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321 *et seq.*, to ensure that federal agencies consider the environmental consequences of proposed major federal actions. 42 U.S.C. 4321; 40 C.F.R. 1501.1(c). NEPA is a procedural statute. It promotes Congress's goal by prescribing the process through which an agency must make its decisions; it does not mandate particular substantive results. *Robertson* v. *Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989); *Inland Empire Pub. Lands Council* v. *United States Forest Serv.*, 88 F.3d 754, 758 (9th Cir. 1996); see *Strycker's Bay Neighborhood Council, Inc.* v. *Karlen*, 444 U.S. 223, 227-228 (1980) ("[O]nce an agency has made a decision subject to NEPA's procedural requirements, the only role for a court is to insure that the agency has considered the environmental consequences; it cannot 'interject itself within the area of discretion of the executive as to the choice of the action to be taken.'") (quoting *Kleppe* v. *Sierra Club*, 427 U.S. 390, 410 n.21 (1976)).

Under NEPA, an agency must prepare a detailed, comprehensive environmental impact statement (EIS) only if a proposal is a "major Federal action[] significantly affecting the quality of the human environment." 42 U.S.C. 4332(2)(C). Regulations promulgated by the Council on Environmental Quality provide that an agency may prepare an environmental assessment to determine whether a proposed action is likely to have a significant impact on the environment. 40 C.F.R. 1501.3, 1501.4. If the agency determines through the preparation of an environmental assessment that the proposed action will not have a significant effect on the quality of

the human environment, the agency issues a finding of no significant impact, and it does not need to prepare an EIS. 40 C.F.R. 1501.4(e), 1508.13.

2. According to petitioner's complaint, Agrium Conda Phosphate Operations manufactures fertilizer at its plant near Soda Springs, Idaho. Agrium obtained the phosphate it used to make the fertilizer from its nearby Rasmussen Ridge phosphate mine. When the Rasmussen Ridge mine was nearing depletion, Agrium began looking for other sources of phosphate for its fertilizer plant. Agrium investigated the possibility of obtaining phosphate from deposits near Vernal, Utah, which are under lease to petitioner Ashley Creek Phosphate Company (Ashley Creek), and are some 250 miles away. Agrium ultimately rejected that option as too expensive and decided instead to pursue an expansion of its existing mining operations at North Rasmussen Ridge. Pet. App. Tab 4, at 6, 11.

In order to carry out its expansion plan, Agrium had to submit a mine and reclamation plan to the Bureau of Land Management (BLM), which manages the relevant mineral rights on North Rasmussen Ridge. BLM determined that an EIS was necessary to evaluate the environmental impacts of the project. The draft EIS evaluated the proposed action and two alternatives, including a "no action" alternative. Pet. App. Tab 4, at 6-7.

Petitioner submitted a letter to BLM commenting that the draft EIS was deficient because it did not consider mining the Vernal, Utah, deposits under lease to petitioner as an alternative to the proposed action. BLM, however, did not add the Vernal deposits to its set of alternatives in the final EIS, reasoning in part that its responsibilities under NEPA did not require it to compare alternate sources of phosphate, but to analyze only

the impacts of (1) the proposal as submitted, (2) the proposal as modified by reasonable alternatives, and (3) the "no action" alternative (in other words, rejecting the proposal). Pet. App. Tab 4, at 6-8.

3. Petitioner filed a complaint in the United States District Court for the District of Idaho, alleging that the EIS violated NEPA because it did not consider as an alternative supplying Agrium's fertilizer plant with phosphate from petitioner's Vernal, Utah, deposits. Pet. App. Tab 1, at 2. The district court dismissed the complaint for lack of jurisdiction. *Id.* at 4. The court held that petitioner failed to allege an injury to an interest within NEPA's zone of interests and that NEPA's zone of interests "does not include purely economic interests." *Id.* at 3-4. The district court relied on the facts that "[petitioner] concedes that it 'does not have an interest in the local Idaho environment'" and that petitioner's only alleged injury was the loss of profits it would have earned from the mining of its own phosphate if BLM had denied the proposal to expand Agrium's phosphate mining operations. *Ibid.* (quoting Pet. Br., No. 03 Civ. 0499 (D. Idaho)).

4. The court of appeals affirmed. Pet. App. Tab 4. The court held that petitioner's alleged injury was insufficient to satisfy the concrete "injury in fact" requirement of Article III because petitioner's Vernal, Utah, phosphate leases did not have a sufficient geographic nexus to Agrium's proposed expanded mining operation. *Id.* at 11-12. The court explained that, because petitioner's phosphate leases are so far away from the site for which the EIS was prepared, petitioner could not "show[] that its phosphate fields are tied to the location of the proposed mining or that the impacts of the mining will affect its property interests." *Id.* at 11. There was

no "legally sufficient link between [petitioner's] interest—getting the BLM to analyze unrelated phosphate deposits 250 miles away from the proposed mines—and NEPA's procedural requirement that agencies analyze the environmental impact of the proposed mining at a specific site, North Rasmussen Ridge." *Id.* at 12. The court noted that, if petitioner's theory of standing were accepted, "any owner of a phosphate mine, whether located in Alaska, Utah, or Florida, would have standing to challenge the EIS." *Ibid.* Indeed, under the same reasoning, "the BLM would be obligated not only to analyze the environmental suitability of unrelated phosphate deposits, but also phosphate substitutes that might be more eco-friendly." *Ibid.*

Although the court of appeals noted that its holding that petitioner could not show injury in fact "is determinative of this appeal," Pet. App. Tab 4, at 9, the court also held in the alternative that petitioner lacked prudential standing, because petitioner asserted only a purely economic injury—"selling phosphate to Agrium"—and thus did not fall within NEPA's zone of interests. *Id.* at 15. The court reasoned that the zone of interests must be defined "with reference to the specific provision of the statute at issue," and concluded that the provision on which petitioner relied, Section 102(2)(C) of NEPA, 42 U.S.C. 4332(2)(C), "does not set out a *purely* economic factor, unconnected to environmental concerns." Pet. App. Tab 4, at 19. It concluded that the Eighth Circuit's decision in *Friends of the Boundary Waters Wilderness* v. *Dombeck*, 164 F.3d 1115 (1999), "can be persuasively distinguished" because the plaintiffs in that case had alleged an environmental injury—a hampered ability to enjoy the area—and "conducted business on and relied upon the lands that would be af-

fected by the agency action." Pet. App. Tab 4, at 19. The court of appeals noted its disagreement with subsequent Eighth Circuit decisions that, in *dicta*, broadly interpreted *Friends of the Boundary Waters* to mean that a plaintiff with purely economic injuries could have standing to challenge an EIS. *Ibid.* (citing *Rosebud Sioux Tribe* v. *McDivitt*, 286 F.3d 1031, 1038 (2002), cert. denied, 537 U.S. 1188 (2003), and *Central S.D. Coop. Grazing Dist.* v. *Secretary of the U.S. Dep't of Agric.*, 266 F.3d 889, 895-896 (2001)).

ARGUMENT

The court of appeals ruled that petitioner lacked both constitutional and prudential standing to challenge the EIS. As an initial matter, further review is unwarranted because the court's holding that petitioner lacked standing under Article III is sufficient to dispose of this case and is not challenged in the question presented by petitioner. In any event, both the court of appeals' prudential and constitutional standing analyses are correct and do not conflict with any decision of this Court or any other court of appeals. Further review is unwarranted.

1. a. The court of appeals noted that "a plaintiff asserting a procedural injury," such as a claim that an EIS was not properly prepared, "does not have standing absent a showing that the 'procedures in question are designed to protect some threatened concrete interest of his that is the ultimate basis of his standing'" under Article III. Pet. App. Tab 4, at 10 (quoting *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 573 n.8 (1992)). The court held that "[w]hat is missing in this case is a legally sufficient link between [petitioner's] interest—getting the BLM to analyze unrelated phosphate deposits 250 miles away from the proposed mines—and NEPA's pro-